Case Comment on Kik v Office for Harmonisation in the Internal Market

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Case C-361/01 P, *Kik* v. *Office for Harmonization in the Internal Market (Trade Marks and Designs)*, (*Kik IV*), judgment of 9 September 2003, not yet reported.

1. Introduction: It all falls down?

> "The decision to adopt a common currency in order to replace the national currencies of most European Union countries was a major operation from which the participant States expected considerable economic benefits as well as a reinforcement of the European Union's political cohesion. The adoption of a common language for Europe would, arguably, entail even greater economic benefits, since linguistic diversity is a practical obstacle to the operation of a common European market and to the effective implementation of common policies. It would also, arguably, boost the sense of European identity and, hence, the social and political cohesion of the European Union. However, there are factors that explain why the adoption of a common currency was possible whereas the adoption of a common language is unthinkable."[1]

The rubric of a European Union in which Member States unite in their diversities is firmly sewn into the ideology of European integration; and the composite multilingualism of the EU is an obvious badge of diversity. Both the ideology and the multilingual reality must, however, find appropriate weightings in an equation of linguistic balance – a formula comprising culture and fundamental rights; efficiency and economy; communication and representation; differentiation; diversity; progress and tradition; preservation and innovation; participation, citizenship, governance, and respect. This captures the many facets of EU language involvement. But for present purposes, the questions provoked by these competing values will be concentrated on just one aspect of EU language functions – the rules that govern the EU administration. In a series of four cases, Ms Kik sought to establish that the EU institutions have got the balance wrong. In so doing, perhaps she forced the beginnings, at least, of a conversation that needs to be had.

1. De Witte, "Language law of the European Union: Protecting or eroding linguistic diversity?", in Craufurd Smith (Ed.), *Culture and European Union Law* (forthcoming, OUP, 2004).

2. Some background: Language and the EU institutions

There is no clearly devised EC language policy. Instead, there is what will here be described as a "language scheme", influenced by a series of (often competing) rules, principles, interests and practices. A basic, though far from neat or absolute, division between language functions internal to the institutions themselves and those with external implications can be observed. For present purposes, the general rules governing communications between the EC institutions and, in its broadest sense, individuals will be focused on.

The critical building blocks here are Articles 290 and 314 EC, and Regulation 1/58.[2] Article 314 EC ensures that several language versions of the Treaties exist, and that all of them are equally (legally) authentic. Article 290 EC provides that "[t]he rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Rules of Procedure of the Court of Justice, be determined by the Council acting unanimously." Regulation 1/58 is its manifestation, in which (since 1 May 2004) twenty "official and working languages of the institutions of the Community" are established: Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish, reflecting (almost exactly) Article 314 EC and representing at least one of the official languages of each Member State.[3] The decision very simply to transpose pre-existing language arrangements in light of EU enlargement consolidates and expands the breadth of a language scheme already unique in the context of other international organizations.[4]

Article 1 of Regulation 1/58 distinguishes explicitly between "working" and "official" languages, but neither explains the distinction nor provides for its realization in practice. What happened, in reality, is that the legal equality of Treaty texts established by Article 314 EC was filtered into the EC language scheme more generally, at least as far as institutional practices with external language implications were concerned. Regulation 1/58 sets down a

2. Regulation 1/58, O.J. 1952–1958 English Spec. Ed. 59.

3. See, however, Council Regulation (EC) No. 930/2004, on temporary derogation measures relating to the drafting in Maltese of the acts of the institutions of the European Union, O.J. 2004, L 169/1. Art. 314 EC includes Irish also, the status of which in the EU language scheme is exceptional; its inclusion in Art. 314 means that all Treaties exist – and are equally authentic – in Irish, it is thus indirectly imported into Art. 21 EC (see below), and it is also a language of the ECJ (again, see below). But its exclusion from Regulation 1/58 means that it is not, in effect, a full "official" EC language.

4. The United Nations, for example, has six official and working languages (Arabic, Chinese, English, French, Russian and Spanish); the Council of Europe has just two (English and French).

simple framework in respect of communications between the Community institutions and the Member States, and (natural or legal) persons subject to their jurisdiction. Member States (and persons subject to their jurisdiction) may write to the institutions in any of the official Community languages and "[t]he reply shall be drafted in the same language" (Art. 2); for natural persons with the nationality of a Member State, this rule is also an integral element of EU citizenship rights, codified in Article 21 EC. But even within the less constitutional premise of Regulation 1/58, it is clear that language choice (at least within the language scheme parameters) is conferred on the Member States, and on individuals where relevant, rather than on the institutions.

For communication the other way around, documents sent by a Community institution to a Member State or to a person subject to its jurisdiction must be drafted "in the language of such a state" (Art. 3; that that language must be one of the official EC languages is understood implicitly here, since these are the only languages mentioned in Regulation 1/58 in the first place).[5]

Although essentially a matter of "internal" work throughout the drafting and adoption processes, regulations and other legislative documents of general application must be drafted in *all* of the official/working languages (Art. 4); in line with the Regulation's ethos of linguistic equality, each language version is treated as equally authoritative in a legal sense.[6] In a related vein, then, Article 5 requires publication of the *Official Journal of the European Union* in twenty languages also. The self-executing character of directly applicable EC law, the implications of the doctrine of direct effect and, fundamentally, the consequences of all of this for individuals as well as for Member States are the basic tenets underpinning the extent of this linguistic spread, shot throughout with a rationale of legal certainty.

Article 6 provides that "[t]he institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases", allowing, in effect, that the institutions may determine their own internal language practices; oddly, the effect of "working languages" is thus

5. If a Member State has more than one official language, selection of the appropriate language is, according to Art. 8, governed by the State's internal language rules (e.g. certain languages may be required to be used in different geographical regions), but the presumption remains that only official EC languages are relevant.

6. See e.g. Case 283/81, *CILFIT* v. *Ministero della Sanità* [1982] ECR 3415, para 18. The Court interprets the different language versions of EC legislation in a teleological or purposive manner; see Van Calster, "The EU's Tower of Babel: The interpretation by the European Court of Justice of equally authentic texts drafted in more than one official language", 17 YEL (1997), 363–393.

felt here but that terminology is not used. Regulation 1/58 itself does not elaborate on the compatibility of Article 6 with the elsewhere prevalent equality of the official languages. But the European Parliament, for example, has stipulated that any internal guidelines must still comply with the linguistic equality formula.[7]

The ECJ is subject generally to Regulation 1/58 but, according to Article 7, "[t]he language to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure."[8] The post-enlargement Article 29(1) of the ECJ Rules confirms that all twenty official EC languages, as well as Irish, may be used in proceedings.[9] Generally, the language of proceedings is selected by the applicant, unless the defendant is a Member State, or a natural or legal person having Member State nationality; in such cases, the official language of that State must be used.[10] Judgments of the ECJ are authentic in the language of the case only, however, but are translated into and published in the other official languages (but not Irish).[11] Moreover,

7. See Doc A3-169/90, especially at paras. 5–6 and 10–12 of the Explanatory Statement, paras. 3–7 of the Opinion of the Committee on Legal Affairs and Citizens' Rights, and paras. 5–7 and 11–12 of the note from the European Parliament's Legal Service.

8. See Arts. 29–31 of the Rules of Procedure of the Court of Justice (O.J. 2003, C 193/1; the necessary amendment to Art. 29(1) was executed via Council Decision of 19 April 2004, O.J. 2004, L 132/2). The same language rules apply (for the most part) in the CFI (see Arts. 35–37 of the Rules of Procedure of the Court of First Instance (O.J. 2003, C 193/2), and O.J. 2004, L 132/3).

9. These rules do not apply, however, to appeals against decisions of OHIM - see Arts. 130 and 131 of the CFI Rules of Procedure; see also the Opinion of A.G. Jacobs in *Kik IV*, delivered on 20 March 2003, para 65.

10. Art. 29(3) stipulates that the language of the case must be used for both oral and written pleadings and for supporting documents; any documents submitted in another language must be accompanied by a translation into the language of the case. See also, Arts. 29(2)(b) and 29(2)(c), which provide that use of another official EC language may be authorized at the joint request of the parties to the proceedings or at the request of one of the parties after the opposite party and the A.G. have been heard. In respect of preliminary references sent by national courts under Art. 234 EC, the language used in the ECJ proceedings will be the language of the national court or tribunal making the reference (see Arts. 29(2) and 29(3) of the Rules of Procedure). Finally, when a Member State intervenes in a case before the ECJ, it may use "its official language" (Art. 29(3)) irrespective of the language of the case; here, responsibility for translating the submissions rests with the ECJ Registrar; but see, in respect of language, translation and time-limits, the Opinion of A.G. Alber in Case C-248/99 P, *French Republic* v. *Monsanto Company and Commission of the European Communities*, [2002] ECR I-1, at paras. 28–32 and 61–64; these points were not considered by the Court in its judgment; see also, Case T-232/00, *Chef Revival USA Inc* v. *OHIM*, [2002] ECR II-2749 and, in respect of the European Ombudsman, Case T-209/00, *Lamberts* v. *European Ombudsman*, [2002] ECR II-2203 and, on appeal, Case C-234/02 P, *European Ombudsman* v. *Lamberts*, judgment of 23 March 2004, nyr.

11. Art. 30(2) of the Rules of Procedure; but see Usher, "Languages and the European Union", in Anderson and Bort (Eds.), *The Frontiers of Europe* (London, Pinter, 1998), pp. 222–234 at 225 et seq, who notes that some judgments have been published only in the lan-

judgments in staff cases are usually published only in the language in which the case was heard, with only a summary of the decision published in the other official EC languages.

3. The case(s)

The *Kik* litigation centres not on the EC institutional language scheme *per se* but, more specifically, on the language rules operable in the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), an EC agency established to process applications for Community trade marks. As prescribed by Council Regulation, OHIM recognizes English, French, German, Italian and Spanish only as its working languages.[12] An application for a Community trade mark may be filed in any of the eleven official EC languages, but applicants must specify a second language – and this must be an OHIM working language – in which the Office may send written communications. Furthermore, the applicant is deemed to accept this second language as the language to be used in opposition, revocation or invalidity proceedings in certain circumstances.[13] If the Community trade mark is granted, it is then translated into the language of each Member State designated in the application.

In *Kik* v. *Council and Commission*,[14] the applicant sought to challenge the (relatively) restrictive OHIM language rules, but the case was dismissed on admissibility grounds.[15] On appeal, the judgment of the CFI was confirmed by the ECJ.[16] But the substance of the claim raised a number of key issues.

guage in which the case was heard. The publication of opinions and judgments on-line also suffers from what might be called "language delay", with one or several language versions often not published on the day of delivery and a delay of anything from a few hours to some months before all language versions become available.

12. Regulation 40/94, O.J. 1994, L 11/1, Art. 115. In *Kik IV*, A.G. Jacobs pointed out (at paras. 57–58 of the Opinion) that, originally, the Commission had even more radically proposed just one trade mark office working language – see O.J. 1980, C 351/5, Art. 103; interestingly, "the" language was not actually specified ("The language of the office for procedural purposes is ....").

13. See Art. 115 of Regulation 40/94, paras. 4–7.

14. Case T-107/94, [1995] ECR II-1717, hereafter *Kik I*.

15. The measure being challenged was a general legislative one and the applicant was found not, therefore, to have standing before the Court in accordance with the requirement of "direct and individual concern" set down in Art. 230 EC; see Case 25/62, *Plaumann* v. *Commission*, [1963] ECR 95 (confirmed in Case C-50/00, *Unión de Pequeños Agricultores* v. *Council*, [2002] ECR I-6677) and Case C-309/89, *Codorniu* v. *Council*, [1994] ECR I-1853).

16. Case C-270/95 P, [1996] ECR I-1987 (*Kik II*); given the straightforward nature of the admissibility point, the case was dismissed by order.

First, there is the question of choice. We saw above that Regulation 1/58 blesses the adoption of reduced language schemes for purposes of internal administration; but in *Kik I*, the relevant procedural framework was, in effect, imposed by a Community body on all trade mark applicants communicating with it. Second, *Kik I* raised the question of whether differing linguistic standards can legitimately apply for the Community institutions, on the one hand, and for Community agencies and bodies on the other. On a literal view, Regulation 1/58 binds only the "institutions of the Community". But while a Community body is not entitled to be classified as an "institution", there are examples of such entities being treated as institutions in certain situations.[17]

After the appeal in *Kik I* was dismissed, the applicant submitted, in Dutch, an application for a Community trade mark, and indicated that she wished to select Dutch as the "second" language. Being in a position more successfully to overcome the obstacle of admissibility, since an OHIM decision (determining her application to be vitiated by a formal irregularity) was now addressed to her, the applicant initiated proceedings for judicial review of the OHIM decision but, in effect, of the OHIM language regime, asking that the legality of Article 115 of Regulation 40/94 be appraised.[18]

In *Kik III*, the applicant forged her submissions in Article 12 EC (non-discrimination on grounds of nationality), arguing that the selectivity of the OHIM rules placed her at a competitive disadvantage *vis-à-vis* trade mark agents who could communicate with the Office in their mother tongue (thus not having to bear either the costs or uncertainties associated with transla-

17. See Usher, *EC Institutions and Legislation*, (London, Longman, 1998), pp. 12–14, citing Case 110/75, *Mills* v. *European Investment Bank*, [1976] ECR 955 and Case C-370/89, *SGEEM* v. *European Investment Bank*, [1993] ECR I-2583. More recently, the provisions of the Charter of Fundamental Rights of the European Union (O.J. 2000, C 364/1) are addressed to "...the institutions *and bodies* of the Union..." (Art. 51, emphasis added); the Final Report of Working Group II to the European Convention on the Future of Europe ("Incorporation of the Charter/Accession to the ECHR"), CONV 354/02, 22 Oct. 2002, recommended that "agencies" be added here also (see p. 5 of the Report), as sought to be effected by Art. II-51 DCT (Draft Treaty Establishing a Constitution for Europe, O.J. 2003, C 169/1).

18. Case T-120/99, *Kik* v. *OHIM*, [2001] ECR II-2235 (*Kik III*). On the issue of admissibility, see paras. 15–33. Essentially, the applicant was allowed to proceed with her plea of illegality (via Art. 241 EC) in respect of Regulation 40/94 upon which the contested OHIM decision was based; the scope of the plea was confined, however, to Art. 115(3) of the Regulation i.e. "[t]he Applicant must indicate a second language which shall be a language of the Office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings. If the application was filed in a language which is not one of the languages of the Office, the Office shall arrange to have the application ... translated into the language indicated by the applicant."

tions). Referring to Regulation 1/58, she urged that OHIM be treated as a Community institution, submitting that "[Regulation 1/58] lays down clearly one of the principles of Community law from which no derogation by subsequent regulation of the Council is permitted."[19] In more political and constitutional language, the Greek Government submitted that "...the Community legal order does not recognize the superiority of particular official languages in relation to the others and that the EC Treaty as well as Regulation [1/58] lay down the principle of plurilingualism and language neutrality."[20] It agreed, looking to "the equivalence of the official languages of the European Communities" and its recognition by the ECJ on many occasions, that the prohibition on nationality discrimination incorporates a prohibition on language discrimination.[21] And it considered that the departure effected by Regulation 40/94 "...is all the more serious because no grounds are given for it...."[22]

Arguments against this position were put forward by the Council. As well as pointing out that OHIM is not an institution, and not therefore governed by Regulation 1/58, it argued that the Council was entitled in any event to derogate from that Regulation since it "...contains no fixed principle of Community law."[23] Taking a very pragmatic view, the Council felt that "...there is no Community law principle of absolute equality between the official languages. Otherwise, there would be no [Article 290 EC]."[24] The Council made express reference to "budgetary considerations" and submitted very simply that it had made a choice, one "...based on a balancing of the interests of undertakings on the one hand and the possible drawbacks such as those raised by the applicant on the other."[25]

The Court of First Instance found that Regulation 1/58 could not establish a principle of equality between Community languages, since this would be "...tantamount to disregarding its character as secondary law."[26] It was felt that the Council had made "...an appropriate and proportionate choice, even if the official languages of the Community were treated differently."[27] This reasoning seems primarily to be based on the fact that the OHIM working languages were selected "from among the most widely known languages in

19. *Kik III*, para 39.
20. Ibid., para 42.
21. Ibid., para 44.
22. Ibid., para 45.
23. Ibid., para 51.
24. Ibid., para 52.
25. Ibid., paras. 53–54.
26. Ibid., para 58.
27. Ibid, para 63.

the Community".[28] In its final statement, the Court confined the scope of Article 21 EC, declaring that the language rules linked to citizenship therein simply do not apply to OHIM.

Yet again, the applicant's persistence extended to appealing the CFI judgment.[29] In respect of Article 115(4) of the Regulation, it had been acknowledged at the oral hearing (by an OHIM representative) that when a trade mark applicant did not use one of the OHIM languages in his/her application, the second language indicated at the time of filing was always used for any further communication(s), even where the applicant remained the sole party before the Office. OHIM submitted here, however, that should an applicant request all written communications (so long as he remains the only party to the proceedings) to be addressed to him/her in the language of the application, this would be refused "only where there are serious and compelling reasons."[30] It asserted also that the reference to "written communications" in Article 115(4) covered "every kind of written document issued by it, including those of a decisional character".[31]

Critically, however, the ECJ drew a definitional distinction between "procedural documents" and "written communications" – the former being "...any document that is required or prescribed by the Community legislation for the purposes of processing an application for a Community trade mark or necessary for such processing ...[which] [c]ontrary to the Office's submissions ... must therefore be drawn up by it in the language used for filing the application."[32] Written communications more generally were found to comprise cover letters, for example, by which the office communicated information to applicants.[33]

More broadly, the appellant reiterated her assertion that there existed a fundamental principle of equality for all languages; again, Articles 21 and 314 EC, and Regulation 1/58, were cited in support. She argued that "...in view of the fundamental nature of the principle of equal treatment in Community law, infringement of that principle cannot be justified by considerations of pure convenience..."[34] And rather than focusing on EC institutions only, the example of the Community Plant Variety Office – "which operates

28. Ibid.

29. As noted above, *Kik IV*; Ms Kik had actually died before either the Opinion of A.G. Jacobs or the decision of the ECJ (and, reflecting the differences here from the relatively straightforward admissibility question in *Kik II*, a judgment this time of the full Court), but her estate proceeded with the appeal.

30. Ibid., para 33.

31. Ibid., para 34.

32. Ibid., para 46.

33. Ibid., para 47.

34. Ibid., para 55.

in all the official languages without any difficulty" – was introduced.[35] Finally, the appellant suggested that an even more limited choice of just *one* second language (English was given as an example) would, in fact, have been less discriminatory than the chosen OHIM regime (a position deemed contradictory by OHIM and by Spain[36]).

Once again, Greece intervened in support of the appellant, pointing in particular to the direct application of many aspects of primary and secondary Community law, and thus to multilingualism as an "... indispensable component of the effective operation of the rule of law in the Community legal order...."[37] The submissions here come closest to identifying Regulation 1/58 not as the *source* of the principle of language equality, but as its manifestation.[38]

In the judgment of the ECJ, Article 21 EC was found not to apply to Community bodies.[39] It was also pointed out that the official languages covered by Regulation 1/58 are "not exactly the same" as those relating to Articles 21 and 314 EC.[40] In terms of language selectivity, the Court found that "...the Community trade mark was created not for the benefit of all citizens, but of economic operators, and that economic operators are not under any obligation to make use of it."[41] It went on essentially to support the balancing idea threading through the judgment of the CFI, and expressly to observe that while languages *were* being treated differently, the selection of the languages "which are most widely known in the Community" was appropriate and proportionate.[42] It reiterated its own distinction between procedural documents and other written communications, however, thus suggesting that "...any difference in treatment that might result from use of the second language would be negligible in scope in any event justified by the operating needs of the Office."[43]

Overall, then, the appeal was dismissed.

35. Ibid., para 56 (referring to Council Regulation (EC) No 2100/94 (O.J. 1994, L 227/1 on Community plant variety rights). On this point, the Council responded that *inter partes* proceedings were exceptional in respect of Community protection of plant varieties. A.G. Jacobs had also dismissed the comparison, but more expressly (statistically) in terms of comparative workload (see his Opinion in *Kik IV*, paras. 64–65); OHIM was considered to be "unique" even in relation to other Community bodies (para 65).

36. *Kik IV*, paras. 68 and 73 respectively.

37. Ibid., para 60.

38. Ibid., para 61.

39. Ibid., para 83 (affirming *Kik III*, para 64).

40. Ibid., para 84, and see also the Opinion of A.G. Jacobs, para 44; in reality, as noted earlier, this refers only to Irish.

41. Ibid., para 88.

42. Ibid., para 95.

43. Ibid., para 96. It should also be noted that Greece had submitted separately that the

4. Comment

The EC institutional language scheme demonstrates that, traditionally, a number of principles – ostensibly language choice and language equality – influenced the shaping of language practices. Any shortcuts were, it seemed, confined to language arrangements internal to the Community institutions, and Article 6 of Regulation 1/58 allows for some flexibility and efficiency in this regard. But the idea of linguistic equality for external functions seemed otherwise fundamental – notwithstanding its extrapolation from a scheme with (originally) four languages, to six, seven, nine, eleven, and now to twenty; and notwithstanding that its execution has thus become an immense undertaking, both technically and financially. Moreover, while institutional contact with individuals became subsequently underpinned by EU citizenship, the broader coverage of Regulation 1/58 depended on neither nationality nor legal personality. Both the circumstances of and decision(s) in *Kik* cause all of these factors, as well as the relationships between the EC languages themselves, to be explored, bringing questions of hierarchy, pragmatism and efficiency far more to the fore than usual (the perspective of EC language discussions having tended previously to fall in more with the dynamics of sovereignty, integration and identity).

In ways, then, the more demanding intensity of language scheme assessment effected via *Kik* is a welcome development, diluting the often polar extremities of feeling associated more usually with language debate (in either a personal or political context). The problem, however, is that not only were more principled considerations divorced from the issues entirely – itself an extremity of approach as incomplete and unhelpful as ignoring the practical reality – but important legal questions on, in particular, the scope and meaning of discrimination were glossed over. We need EC language scheme reform; but it is far from clear that the methodology of *Kik* provides the best platform from which this might be achieved.

Some of these implications seem somewhat narrow or, at least, relatively self-contained. For example, on a literal view, Regulation 1/58 binds only the "institutions of the Community", and so does not form a barrier to the OHIM linguistic framework *per se*; both the CFI and ECJ confined its scope in this way. While a Community body is not in a strict or technical sense entitled to be classified as an "institution", it can be treated as being in a position analo-

CFI had failed to take into account its plea of failure to state reasons in respect of Art. 115 of Regulation 40/94, or to raise the issue of its own motion; these arguments were dismissed, however, by the ECJ (see paras. 100–104).

gous to that of an EC institution.[44] But whatever the status of the authority, be it an EC institution or other EC body or agency, the consequences of its language rules for the individual dealing with it are the same. This point was not really considered in the judgments at all, beyond an unconvincing distinction between "citizens" and "economic operators", the ethos of which runs directly contrary to Regulation 1/58. Trade mark specialization does not imply linguistic specialization.

In the finding that the language rules linked to EU citizenship in Article 21 EC did not apply to OHIM, a severance of compliance by Community bodies with rules governing the institutions was effected. In terms of consequences encountered, however, the "any person" approach used in Regulation 1/58 has obvious merit; and in this regard, debate on the exclusive nature of EU citizenship, linked as it currently is to Member State prescriptions of nationality, has much to resolve. OHIM may well be "unique" in terms of workload, even *vis-à-vis* other Community bodies; but no-one suggested that this might merit the employment of an exceptional or "unique" number of translators rather than working through an exceptionally reduced number of languages. This may not turn out to be the most efficient or even appropriate solution, but is it not one that should, at least, have been discussed ?

The principle/pragmatism balance can be seen clearly to have influenced the Opinion of Advocate General Alber in *Parma Ham*, delivered after the CFI judgment in *Kik III* but before that of the ECJ.[45] The Advocate General asserted at the outset that "...the extent to which a citizen's obligations under Community law must be accessible to him in his mother tongue, at least in so far as it is one of the official languages of the Community, is a fundamen-

44. See note 17, *supra*. See also, however, Curtin and Van Ooik, "The sting is always in the tail: The personal scope of application of the EU Charter of Fundamental Rights", 8 MJ (2001), 102–114 at 107–8, who point out that EU bodies are still likely to be outside the scope of many Charter provisions, citing Art. 41(4) expressly (the Charter "version" of Art. 21 EC) given its specific reference to "the institutions". Again, referring to Regulation 40/94, they argue (at 108) that "[t]he bodies of the Union are not mentioned in this provision, and probably this was a deliberate omission. Otherwise, the OHIM, for example, probably would have to make drastic changes to its linguistic regime... [Art. 51 of the Charter] cannot expand the personal scope of application to unmentioned EU bodies/organs. For a citizen like Mrs Kik, this would imply that she would still loose [sic] her case, even if the Charter were to be legally binding and enforceable before the Court of First Instance." This argument does not take into account, however, the breadth of Art. 21 of the Charter, discussed below.

45. Case C-108/01, *Consorzio del Prosciutto di Parma, Salumificio S. Rita SpA* v. *Asda Stores Ltd and Hygrade Foods Ltd*, [2003] ECR I-5121, at paras. 133 et seq. of the Opinion. The case relates to product specifications as governed by Regulation 2081/92, O.J. 1992, L 208/1 (as amended).

tal question."[46] But, citing *Kik III*, he observed also that "[a] right cannot at any rate be derived from that provision whereby all Community law measures must necessarily be available in every official language."[47] Interestingly, he did draw an analogy between citizens and their rights under Article 21 EC, and the "economic operators" here seeking information from the Commission in a language other than that in which the product specification had been registered (a translation of the specification from its original language thus being sought also); he even suggested that a solution in that vein would "...perhaps comes closest to meeting the requirement of legal certainty."[48]

But, immediately, it was countered that neither the "mixed national/Community nature" of the designation of origin registration procedure nor the "substantial translation burden" imposed on the Commission would be taken into account as a result.[49] Adding to the mix the fact that judicial protection of the product specification would be sought in the national courts (of the Member State of product origin), he then concluded that "...a business concerned with placing foreign goods on the market ... will generally have the linguistic knowledge necessary for importing the goods or otherwise has available to it appropriate means of overcoming the associated language difficulties. It can therefore also be expected to overcome the obstacles resulting from the fact that the specification is available in the original language only."[50] A similar blanket presumption in favour of the linguistic capacity or resources of economic operators runs clearly throughout the various decisions in *Kik* – again, something entirely at odds with the rationale underpinning Regulation 1/58.[51]

46. Ibid., para 135.
47. Ibid.
48. Ibid., para 138.
49. Ibid.
50. Ibid., para 141. While the Advocate General did refer to Arts. 4 and 5 of Regulation 1/58, he did not, unfortunately, consider the scope of Art. 3. There is no comparable discussion in the judgment of the ECJ, which hinges more on the broader notion of "adequate publicity" of the protected designations (see paras. 87–99 of the judgment).
51. See further, the Opinion of A.G. Jacobs in *Kik IV*, para 47, where he distinguishes clearly between "the rights of citizens of the Union acting *as such*" (emphasis added) and "the professional activities a trade mark agent"; the meaning of "as such" is not, however, as certain as seems to be implied. The balance between legal certainty and affordability is also central to the draft Regulation on the Community Patent – see COM(2000)412, which includes some detailed discussion of language arrangements, including translation costing tables, and which proposed, in effect, a regime of three languages (English, French and German); see also, however, the Palacio Report on the draft Regulation to the European Parliament (A5-0059-2002), which argues for comparability with the OHIM trade mark regime (thus adding Italian and Spanish).

But it is the striking absence of more principled or thematic reasoning on the foundations of EC language policy that is most noticeable in the *Kik* narrative. Neither the CFI nor ECJ delivered a judgment that seemed to take discrimination very seriously. Indirectly, the ECJ decision implies, at least, a strong flavour of it; its enforced distinction between procedural and other communications, with the former category being considerably more inclusive than the latter, significantly confines the OHIM practice of second-language use. This can be derived from the CFI reasoning.[52] But the breadth of the consequences – and the much-strengthened position of the individual in turn – become clear only when the definition of "procedural documents" is set out; the fact that OHIM submitted arguments to the contrary even in the appeal proceedings supports the sense of novelty effected only by the ECJ.

Both the CFI and ECJ judgments are all about the justification, lacking any real acknowledgement of the pre-existing principle being (even justifiably) infringed. Surely the principle necessarily has to precede the justification – again, something which can be implied from the constructions of reasoning used (principle-justification-proportionality), and even the constructions of, for example, the Council's submissions; but it is never simply *said*. Because why, otherwise, would something need to be justified in the first place? Moreover, the very formalist dismissal of Articles 21 and 314 EC as sources of a linguistic equality principle (again, ignoring the argument of manifestation) never really gets to grips with the most basic question posed by the applicant – does non-discrimination on grounds of nationality under Article 12 EC encompass, even indirectly, discrimination on grounds of language? Even if that question could have been answered negatively, the inclusion of language discrimination *per se* in Article 21 of the Charter of Fundamental Rights surely contributes, at least, to a contrary legal threshold. And should the Draft Constitutional Treaty ("DCT") be adopted, the Charter and thus Article 21 will be legally binding – thus, there will exist a binding "prohibition" provision of considerable scope, diluting the consequences of the exclusion of language from the present "enabling" provision, Article 13 EC.

52. See again, *Kik III*, para 61: "...it is apparent from the actual wording of Article 115(3) of Regulation No 40/94 that, by indicating a second language, the applicant accepts use of that language as a language of proceedings only in relation to opposition, revocation or invalidity proceedings. It follows, as indeed is confirmed by the first sentence of Article 115(4) of Regulation No 40/94, that so long as the applicant is the sole party to proceedings before the Office, the language used for filing the application for registration remains the language of proceedings. Consequently, in such proceedings, Regulation No 40/94 cannot be taken, in itself, as in any sense implying differentiated treatment as regards language, given that it in fact guarantees use of the language of the application filed as the language of proceedings and thus the language in which procedural documents of a decisional character must be drafted."

It is difficult to see how this situation is compatible with Article 51(2) of the Charter ("This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties"), unless Ms Kik was right – that Article 12 EC and non-discrimination on grounds of nationality must already, then, encompass language discrimination. This in turns renders it arguable that measures requiring more positive action in respect of language are not dependent, then, on Article 13 EC (nationality being also absent from that provision); in terms of the DCT, this would place language (implicitly) within Article III-7 ("European laws or framework laws may lay down rules to prohibit discrimination on grounds of nationality ...") rather than the "new" Article 13 EC (Art. III-8).

The dismissal of any real discussion on Article 12 EC doesn't quite fit with the Court's jurisprudence on language and discrimination more generally either, thinking, for example, of case law on the free movement of persons.[53] Advocate General Jacobs dispensed with discussion of these cases on the narrow point that they do not establish "that all official languages must in all circumstances be treated equally for all purposes";[54] but this precludes an appreciation of the broader culture of (language) non-discrimination which emerges from those judgments, or any construction of a principle which is not quite so absolute as that portrayed by the Advocate General but which could instead be, as appropriate, justifiably limited.

Does the *Kik* case law mean that the equality of the official EC languages is just a political folly, then, carrying no legal weight? Given the lengths to which the Member States – *and* EC institutions – have gone actually to realize and manage an equality of languages over the years, even in the face of considerable practical obstacles, to dismiss its grounding as a general principle of EC law seems absurd. The thin legal reasoning adopted by the CFI in *Kik III* detracts even further from the logic of its conclusions. The softening character of the ECJ decision in *Kik IV* is somewhat different. That Court seemed more comprehensively to deal with, and thus realize, a *de facto* principle of non-(linguistic) discrimination; but it stopped well short of stating it, let alone calcifying it. The combined effect of the judgments thus supplants the relative surety of an assumed fundamental principle of the Community legal order with the fluidity of doctrinal deficit. Any resolution of the discrimination question was channelled firmly but wrongly from speakers to languages more abstractly.

53. See in particular, Case 137/84, *Ministère Public* v. *Mutsch*, [1985] ECR 2681, Case C-379/87, *Groener* v. *Minister for Education and the Dublin Vocational Education Committee*, [1989] ECR 3967, Case C-274/96, *Criminal Proceedings against Bickel and Franz*, [1998] ECR I-7637 and Case C-281/98, *Angonese* v. *Cassa di Risparmio di Bolzano*, [2000] ECR I-4139.

54. *Kik IV*, Opinion of A.G. Jacobs, para 50.

The judgments in *Kik* cannot be divorced from the reality of political balance – of finances, linguistic streamlining and EU enlargement. And Advocate General Jacobs rightly noted that the balancing issues at play here cannot be so simply distilled down to the "... Member States seeking to defend themselves on financial grounds against charges of infringement of fundamental Treaty freedoms ... In adopting the legal framework for establishing the Office, including its linguistic regime, the Council was correctly driven by the imperative of setting in place a system which would work."[55] Pragmatism obviously – and properly – has its place in any discussion of EC language arrangements. But the interpretative reasoning applied in *Kik* – or more properly, the lack of it – could have repercussions well beyond OHIM; the reluctance of the Courts to set out a constitutional basis for EC language policy leaves even the institutional language practices (outside Art. 21 EC) open to simple legislative amendment. Only one of the Member States, Greece, seemed remotely troubled in this regard, somewhat ironically given its own domestic record in respect of linguistic minorities. Just one other Member State – Spain – intervened, and from a position of some comfort since Spanish is one of the OHIM languages. Its submissions were loaded with pragmatism, stressing the fact that the rules allow for "a choice between the five most common languages in the Community".[56] But would Spain feel quite so serenely about things if OHIM was instructed to employ *four* languages common in the Community? Or if the European Patent Office ends up processing applications through English, French and German only?

The silence of the majority of Member States is difficult to understand. Where was France, which drives home a stringent language policy domestically? Where was linguistically responsive Belgium? Where was Ireland, which had rigorously defended its own national language policy in *Groener*? Where were the "small" Member States, like Denmark or Portugal, who, we are told, deplore and fear the linguistic dominance of two or three languages at EU level? Where was the Netherlands itself? Instead, the Member States, bar one, were collectively represented in *Kik* by the submissions of the Council (supported, in the appeal, by the Commission), thus quietly endorsing an appreciable inroad into the traditional perception of EC language policy.

Confirmation of a general principle of respect for linguistic equality would not necessarily rule out the result achieved in *Kik*. But while it might seem appropriate that EC language policy be endowed with a considerable

55. Ibid., para 63.
56. *Kik III*, para 50.

degree of flexibility – enabling it more successfully to be adapted to various language policy domains – flexibility which itself rests on an ephemeral footing brings distinct problems, and generates a certain paradox. On the one hand, by trying to evade an honest debate and failing to deal more openly with what is actually going on regarding language use in the EC/EU institutions, the already strained absolutism of linguistic equality actually becomes further entrenched as an untouchable ideology. Yet into this mottled picture, ironically, we must now, somehow, fit *Kik* – in terms of both the comparatively disinterested submissions of the Council and the decision, in particular, of the CFI in *Kik III*. Attempting to engage in the process of language scheme reform in a piecemeal and isolated manner will serve simply to exacerbate many of the difficulties already evident; it will not cure them.

The absence of more open debate on language arrangements is all the more inexcusable in light of EU enlargement. Ironically, it would appear that the "constitutional" character of language equality was suggested in the course of IGC 2000.[57] But little else has happened. The Translation Service of the European Union has recently produced an information booklet, but this is more a detailed explanation of the Office's functions, methods and resources, as well as translation statistics, than any critical discussion of language arrangements or EU enlargement. Perhaps somewhat unhelpfully in light of *Kik*, the document refers to "equal status for the official languages" and reaffirms that "residents of Member States have the right to communicate with the EU institutions in their own language" according to Regulation 1/58.[58] It is also suggested that "[a]s the European Union grows, the practical difficulties of according equal status to the languages of its constituent nations will also grow; but any approach that failed to respect the languages of the peoples of the Union would betray the very foundations of Union philosophy."[59]

57. In the progress report on IGC 2000 prepared for the Feira European Council (CONFER 4750/00, 14 June 2000), Art. 290 was described as a provision "which, in view of the *sui generis* character of the European Union may be considered "quasi-constitutional" (Annex 3.7, p. 90) and, as such, was deemed to merit maintenance of the unanimity requirement *vis-à-vis* voting in the Council. Art. III-339 of the Draft Constitution for Europe (O.J. 2003, C 169/1) is roughly equivalent to Art. 290 EC, retaining the need for unanimity but seeming to invite the revision of Regulation 1/58 ("The Council of Ministers shall adopt unanimously a European regulation laying down the rules governing the languages of the Union's institutions, without prejudice to the Statute of the Court of Justice").

58. Translation Service of the European Union, *Translating for a Multilingual Community*, October 2003, at europa.eu.int/comm/dgs/translation/bookshelf/brochure_en.pdf, p. 3; on enlargement, see p. 14.

59. Ibid.

Neither the work nor results of the Convention on the Future of Europe redress the Nice language gap. A number of submissions contained minor references to the EU and its official languages,[60] but there are few comprehensive language programme reform papers. One draft provision on language attempts ambitiously to capture, in effect, a combination of Article 21 EC (but with extension to legal persons), the OHIM rules, the proposed European Patent Rules, and all with a limited nod to enlargement.[61] What this has in common with the implications of *Kik* is that it would seem to prefer a scheme based more on the classification of the entity involved than the communicative effects actually generated; the concept of a "formal administrative procedure" was also dangerously ambiguous. But the proposal at least recognized that the Treaty rules on language are currently inadequate, and sought to provide a minimum but sufficient degree of language policy prescription. In contemplation of the Convention, the European Bureau for Lesser Used Languages (EBLUL) did develop a "Package" of three proposals, including a detailed draft Treaty article on linguistic diversity;[62] but that

60. Some of these papers could be classed as broadly in favour of language reduction, either expressing or implying practical concerns; see e.g. CONV 313/02 (submitted to Working Group X (Freedom, Security and Justice), including a statement from the Director of Europol (pp. 4–5) regretting "the need for Europol to work in [eleven] languages and the absence of a single working language", in the context of "too much emphasis on national sovereignty"). Others make more principled, but typically vague, statements on languages and diversity; see e.g. the Report from the Presidency of the Convention to the President of the European Council (18 July 2003, CONV 851/03), which, as one of fifteen points, refers to "equality of languages" (p. 24), but this is then confined to the function of "legislating".

61. See CONV 495/03 ("Freiburg Draft of a European Constitutional Treaty", 20 Jan. 2003), Art. 11 of which reads: "(1) The Union acknowledges the multitude of languages as part of the cultural heritage of the Union. (2) Every citizen of the Union and every natural or legal person residing or having its registered office in a Member State may contact the institutions of the Union in any of the languages of this Constitutional Treaty and shall be entitled to a reply in the same language. (3) In formal administrative procedures a second language shall be nominated which the affected person agrees on using as procedural language. This second language may either be English, French, German, Italian, Polish or Spanish. (4) The institutions reserve the right to establish rules on the internal working languages in their Rules of Procedure. The number of working languages must be at least three." This proposal does not deal with language and the legislative function, but perhaps a continuation of present arrangements is implied, in light of the express restriction in paragraph (4).

62. See EBLUL, *Package for Linguistic Diversity: Three Proposals to the Convention on the Future of the European Union* (Bilbao, 24 June 2002), including the statement (at para 3) that "[t]he European Union shall endeavour to ensure that no EU policies or measures are adopted or applied in ways that are detrimental to the linguistic diversity of Europe." EBLUL proposed, in addition, the amendment of Art. 13 EC to include non-discrimination on grounds of "language" and changing the voting requirement in Art. 151 EC (culture) from unanimity to qualified majority – only the last of these objectives has been secured.

draft leaned more in the direction of complimenting Article 151 EC on cultural policy than the broader functions of EU language use and practices.[63]

Even though the constitutional dimension of EC language policy has been argued here to be lacking, it is simply a fact that the political will really to take language policy on board, in whatever guise, is just not there. The Community Courts were thus caught between a rock and a very hard place – how to attempt to deal pragmatically with the language demands faced by Community bodies, at the threshold of EU enlargement, and with no discernible commitment to more serious language policy reform; how to consider a constitutional principle of language equality yet one into which it was possible to weave appropriate limitations; and how best to set out the legitimate scope of those limitations. By focusing on a formalist institution/body distinction and, only in the final judgment, hinging protection on a broad definition of "procedural documents" (which clearly contradicted typical OHIM practice at least up to that point), neither the reality of language rules, from the perspective of natural and legal persons actually affected, nor the deep principled threads underlying them seemed properly to be recognized.

Instead we need to start from the outside, and work back in – from a principled but meaningful commitment to languages, to the reality of multi-state

63. See somewhat more broadly, however, the submission to the Convention of Europa Diversa (available at www.linguapax.org/pdf/europadiversa2.pdf), which sought more holistically to address, to some extent at least, both cultural and administrative aspects of EU language functions: "... Europa Diversa ... Propose the following to the Convention on the Future of Europe, the institutions of the European Community and the governments of its Member States:

1. Including in the Treaty establishing the European Community an article on the safeguarding and promotion of linguistic and cultural diversity in Europe. This might be either an entirely new article or a revised and expanded form of Article 151 (Culture). It would make more explicit both the commitment to linguistic as well as cultural diversity, and the need for an active policy in this area. ...

2. Amending Article 13 of the Treaty establishing the European Community to include discrimination based on language. ...

3. Putting into place a multiannual Community action programme to support and promote linguistic diversity. This programme would give practical effect to the principles enshrined in the proposed article (see point 1 above). ...

4. Extending all current EC language programmes, or actions that are language-specific, to cover all autochthonous European languages. ...

5. Establishing a public debate to reform the rules governing the languages of the institutions of the Community and enshrining the general provisions in an Article of the Treaty, (while empowering each to lay down its own language rules), so as to ensure efficiency and a substantial redistribution of the very large budget of the present arrangement. ...

6. Ensuring that the principle of subsidiarity is reflected in matters of language policy, so that all tiers of government work together, with sufficient resources, in order to safeguard linguistic diversity...."

administration, informed but not overwhelmed by *either* sentiment or efficiency. We need to set out the range of EU language functions, and within these functions, the range of practices *and*, crucially, their effects; the cornerstone EU principles of non-discrimination and proportionality must *both* then be weighed when considering where limitations and reductions can reasonably be imposed, and where they cannot – and this must be done more in contemplation of effect than blanket assumptions and formulaic hierarchies.

The fundamental character of the discussion that was crying out to be had, in a general sense, and the persistence of Ms Kik, more specifically, deserved more than this strand of case law has delivered. In her determination to bring about a real discussion of EC language rules and EC language rights, her arguments deserved, at the very least, to be answered. Otherwise, the OHIM rules today, the European Patent Office tomorrow – and what next? Article III-339 DCT openly invites a language policy rethink; and the combined effect of the *Kik* decisions means that, outside the (narrowly construed) scope of citizens' written communications under Article 21 EC, the language scheme of Regulation 1/58 is utterly revocable. But, ironically, it seems that no-one wants to talk – openly – about what might or should replace it.

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